

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF VETERANS AFFAIRS

Brian D. Balfanz,

Petitioner,

vs.

City of St. Paul,

Respondent.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND RECOMMENDATION**

The above-entitled matter came before Administrative Law Judge Jeanne M. Cochran for an evidentiary hearing on April 3, 2014, at the Office of Administrative Hearings in St. Paul, Minnesota.

Rachel G. Tierney, Assistant St. Paul City Attorney, appeared for the City of St. Paul (City or Respondent). John D. Baker, Baker Williams LLP, appeared for Brian D. Balfanz (Petitioner).

With the agreement of the Administrative Law Judge, the parties filed written closing arguments. On April 18, 2014, the Petitioner, Brian D. Balfanz, filed his post-hearing brief.¹ On May 2, 2014, the Respondent, City of St. Paul, filed its responsive post-hearing brief.² The hearing record closed on that date.

STATEMENT OF THE ISSUE

Whether the City of St. Paul violated rights afforded to the Petitioner under Minn. Stat. § 197.455, a provision of the Veterans Preference Act, when the City failed to add points to the Petitioner's final score for an examination given in connection with the hiring process for the position of Park and Recreation Program Supervisor.

¹ Petitioner's Post-Hearing Brief (April 18, 2014).

² City of St. Paul's Closing Argument (May 2, 2014).

SUMMARY OF CONCLUSION

The City of St. Paul violated the Petitioner's rights under Minn. Stat. § 197.455, subd. 5 when it failed to add 15 points to the Petitioner's passing examination score for the position of Park and Recreation Program Supervisor based on his status as a disabled veteran.

Based on the evidence in the record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Petitioner, Brian Balfanz, is a veteran.³ He served in the first Gulf War.⁴ He received an honorable discharge from the Army, and has a forty (40) percent service connected disability as determined by the United States Department of Veterans Affairs (USDVA).⁵

2. The Petitioner currently works for the City of St. Paul Police Department as a Research Analyst II.⁶ The Petitioner has been employed by the City of St. Paul since January of 2000.⁷ He began his career with the City as a contract worker, and, in July 2000, became an Engineering Aide II in the Public Works Department. He was promoted to Research Analyst I with the Parks Department in June 2001, and subsequently promoted to Research Analyst II in January 2005. In 2012, he transferred to his current position in the Police Department.⁸

Park and Recreation Program Supervisor Hiring Process

3. On March 29, 2013, the City posted three full-time openings for the position of Park and Recreation Program Supervisor.⁹ The posting notified potential applicants that the position was "open to anyone who meets the position requirements."¹⁰

4. The City posted the Park and Recreation Program Supervisor position as "open" to both external and internal candidates because the City's Human Resources Department did not think there would be enough internal candidates to fill three openings if the position was posted internally only.¹¹

³ Stipulation of the parties; Affidavit (Aff.) of Brian D. Balfanz at ¶ 5 (attached to Petitioner's Response Motion to Respondent's Motion for Summary Disposition (February 7, 2014) (Petitioner's Response)).

⁴ Testimony (Test.) of B. Balfanz.

⁵ *Id.*; Exhibit (Ex.) C.

⁶ Test. of B. Balfanz.

⁷ *Id.*; Ex. A; Test. of Lisa McKeown.

⁸ *Id.*; Ex. A; Test. of L. McKeown.

⁹ Ex. B at B-1; Test. of L. McKeown.

¹⁰ *Id.* at B-2; Test. of L. McKeown.

¹¹ Test. of L. McKeown; Test. of Lyle Babcock.

5. Seventeen (17) internal candidates and twenty-two (22) external candidates who met the minimum qualifications applied for the position of Park and Recreation Program Supervisor. The Petitioner was one of those applicants.¹²

6. The Petitioner applied for the position on April 10, 2013.¹³ When he applied, the Petitioner provided evidence that he was a veteran.¹⁴

7. The posting for the Park and Recreation Program Supervisor position stated that the job examination would involve two parts: a Training and Experience Examination, and an Oral Presentation. The posting provided that:

Only candidates who achieve a passing score of 75% on the Training and Experience Exam will be allowed to participate in the Oral Presentation....
Final Scores will be calculated as follows: (Training and Experience Exam Score*.60) + (Oral Presentation Score*.40)¹⁵

8. Seventeen (17) internal (promotional) candidates and 17 external candidates achieved a passing score on the Training and Experience Exam.¹⁶ The Training and Experience Exam was the same for all applicants, both promotional and external.¹⁷

9. Because a higher than expected number of promotional applicants passed the first part of the test, the City decided to have only the promotional applicants participate in the second part of the test, the Oral Presentation.¹⁸ No external applicants were invited to do the Oral Presentation,¹⁹ even though the posting for the position stated that "candidates who achieve a passing score of 75% on the Training and Experience Exam will be allowed to participate in the Oral Presentation."²⁰

10. The Petitioner received a passing score on the Training and Experience Exam, and was allowed to participate in the Oral Presentation.²¹

11. After completing the Oral Presentation, the Petitioner received a final score of 75.7.²² This score placed him 13th on the list of promotional candidates.²³

¹² Test. of L. McKeown; Aff. of L. McKeown at ¶ 9; Test. of B. Balfanz; Ex. 2.

¹³ Test. of B. Balfanz; Ex. 2.

¹⁴ Test. of B. Balfanz.

¹⁵ Ex. B.

¹⁶ Test. of L. McKeown.

¹⁷ See Ex. B.

¹⁸ Test. of L. McKeown; Test. of L. Babcock.

¹⁹ Test. of L. McKeown; Test. of L. Babcock; Ex. B at B-2.

²⁰ Ex. B at B-2. The City sent a letter to the external applicants who passed the first part of the test, but were not asked to take the second part of the test, informing them of the City's decision. Test. of L. Babcock.

²¹ Test. of B. Balfanz; Ex. 4.

²² Test. of B. Balfanz; Ex. 6.

²³ Test. of L. McKeown; Test. of B. Balfanz.

12. The top-ranked promotional candidate scored 85.4 out of 100.²⁴ The Petitioner was not interviewed by the City for any of the three openings for Park and Recreation Program Supervisor. Those positions were filled with other promotional candidates.²⁵

13. On or about April 30, 2013, after the Petitioner learned his final score, the Petitioner contacted Lyle Babcock, a Human Resources Consultant with the City, to inquire about his score and ranking. He also asked if any points had been added to his score based on his status as a veteran. On May 1, 2013, Mr. Babcock sent an email to the Petitioner discussing how his final score was calculated. He also told the Petitioner that the City did not add any points to the Petitioner's score based on his status as a veteran.²⁶

14. Mr. Babcock further stated that the City did not add any veterans preference points because the examination was a promotional examination and the Petitioner did not qualify for promotional preference points.²⁷ Mr. Babcock explained that to qualify for preference points on a "Promotional Exam, a veteran must have a passing score and received a USDVA active duty service connected disability rating of 50% or more. Disabled veterans eligible for such preference may use the preference only for the first promotion after securing City employment."²⁸

15. In support of his view, Mr. Babcock cited Minn. Stat. § 197.455, a provision of the Veterans Preference Act.²⁹ This statute specifies when a city is required to add points to a veteran's passing job examination score. Different criteria apply depending on whether the examination administered is a "competitive promotional examination" or an "open competitive examination."³⁰

16. The Petitioner did not agree with Mr. Babcock's view that the City had administered a promotional examination. The Petitioner believed instead that the City had given an open examination for the position. On this basis, the Petitioner asked that 15 points be added to his score pursuant to Minn. Stat. § 197.455, subd. 5.³¹ Mr. Babcock denied the request and referred the Petitioner to his boss, Lisa McKeown, Human Resources Manager for the City.³²

17. Shortly thereafter, the Petitioner emailed Ms. McKeown.³³ The Petitioner inquired as to whether the examination he took was an open competitive examination and whether 15 points were added to his score. Ms. McKeown responded in an email dated May 10, 2013. In her response, Ms. McKeown did not directly address Petitioner's

²⁴ Ex. 6.

²⁵ Test of L. McKeown; Ex. 6.

²⁶ Test. of B. Balfanz; Ex. 5 (emails dated April 30, 2013 and May 1, 2013); Test. of Lyle Babcock.

²⁷ Test. of B. Balfanz; Ex. 5 (emails dated April 30, 2013 and May 1, 2013).

²⁸ Ex. 4.

²⁹ *Id.*

³⁰ Minn. Stat. § 197.455, subds. 4-6.

³¹ Test. of B. Balfanz; Exs. 8-9.

³² Test. of B. Balfanz.

³³ Test. of B. Balfanz; Ex. 9.

question regarding whether the examination was an open competitive examination or a competitive promotional examination. Instead she stated, "On our website, we have job openings posted in two categories: Open (to the public) and Internal." With regard to his question about additional points, Ms. McKeown stated that the Petitioner was not awarded veteran's points because he was a promotional candidate and promotional candidates are only entitled to points in limited circumstances under the Veteran's Preference Act, which he did not meet.³⁴

18. In an email dated May 13, 2013, the Petitioner again requested that 15 points be added to his score. The Petitioner stated: "I am concerned that the City may be in violation of State Statute 197.455(a) [sic] by superseding the essence of an open competitive exam and my disabled veterans preference rights with internal processes."³⁵ He also asked Ms. McKeown again whether she believed the examination was an open competitive exam.³⁶

19. On that same day, Ms. McKeown responded in an email stating: "[t]he Parks and Recreation Supervisor exam was posted as open to the public and was competitive. Since you meet the promotion definition listed in [Civil Service Rule 14], you are placed on a promotion list and considered a promotion candidate taking a competitive promotional exam."³⁷ Ms. McKeown also reiterated that the City did not believe that the Petitioner was entitled have any points added to his score for the position because he was a promotional candidate and was not fifty percent disabled as required by Minn. Stat. § 197.455.³⁸

20. The Petitioner then asked Angie Nalezny, Ms. McKeown's supervisor, to add 15 points to his score. Ms. Nalezny declined and deferred to Ms. McKeown.³⁹

21. On October 7, 2013, the Petitioner filed a Petition for Relief under the Veterans Preference Act with the Minnesota Department of Veterans Affairs.⁴⁰

City of St. Paul Civil Service Rules

22. The Park and Recreation Program Supervisor position at issue in this case is a classified position and is subject to the City's Civil Service Rules.⁴¹

23. The Civil Service Rules require that the job opening be posted for at least 20 days.⁴² The City can post a position either as Open (i.e. open to anyone, both

³⁴ Ex. 9.

³⁵ Ex. 10 at 2 (May 13, 2013 email sent at 8:20 a.m.)

³⁶ *Id.*

³⁷ Ex. 10 at 1 (May 13, 2013 email sent at 9:20 a.m.); Test. of L. McKeown.

³⁸ Test. of L. McKeown; Ex. 10 at 1.

³⁹ Test. of B. Balfanz.

⁴⁰ Ex. F.

⁴¹ Test. of L. McKeown.

⁴² *Id.*

external and internal candidates) or as Internal (i.e. only for internal candidates). There are times when the City will post a position as Internal only.⁴³

24. The Civil Service Rules provide that the total number of points possible in an examination shall be 100.⁴⁴

25. Applicants who score less than 75 points are deemed to have failed the examination.⁴⁵

26. The Civil Service Rules also provide that the City is to add points to the passing score of a veteran in accordance with the Veterans Preference Act, where applicable.⁴⁶

27. After the examination is complete, “the names of all applicants who pass the examination shall be placed on an eligible list in the order of their examination scores, and shall remain on the list until they are hired or until the list expires.”⁴⁷

28. The Civil Service Rules also provide that “when an examination is scheduled for both promotional and original entrance,” the names of eligible applicants “shall be entered on two separate lists: a Promotional List and an Original Entrance List.”⁴⁸ A candidate is eligible for the Promotional List if the candidate has passed the examination, has worked for the City for at least two years, has a satisfactory performance evaluation, and is applying for a promotion. Under the Civil Service Rules, a “promotion” means “any change of an employee in the classified service from a position of one class to a position of another class for which there is a higher maximum rate of pay.”⁴⁹ All other eligible applicants are placed on the Original Entrance List.⁵⁰

29. The Civil Service Rules provide an absolute preference for promotional candidates, even where the job posting is open to both internal and external applicants and even when the same examination is given to all applicants.⁵¹

30. The hiring preference for promotional candidates in the Civil Service Rules has been incorporated into the Collective Bargaining Agreement between the City of Saint Paul and the Professional Employees Association.⁵²

Based on these Findings of Fact, the Administrative Law Judge makes the following:

⁴³ Test. of L. McKeown; Ex. 9.; Test. of L. Babcock.

⁴⁴ Ex. G (Civil Service Rule 6.B).

⁴⁵ *Id.* (Civil Service Rule 6.D).

⁴⁶ *Id.* (Civil Service Rule 7).

⁴⁷ *Id.* (Civil Service Rule 7).

⁴⁸ *Id.*

⁴⁹ *Id.* (Civil Service Rule 2). A promotion can be from one department to another within the City. Test. of L. McKeown.

⁵⁰ *Id.* (Civil Service Rule 7).

⁵¹ Test. of L. McKeown; Ex. G (Civil Service Rule 8).

⁵² Ex. E; Test. of L. McKeown.

CONCLUSIONS OF LAW

1. Under Minn. Stat. §§ 14.50 and 197.481, the Commissioner of Veterans Affairs and the Administrative Law Judge have authority to consider the issues raised under the Veterans Preference Act, Minn. Stat. §§ 197.455-197.481, in this proceeding.

2. The Notice of Petition and Order for Hearing was proper in all respects, and the Department of Veterans Affairs has complied with all relevant, substantive and procedural requirements of statute and rule.

3. The Petitioner and the City received timely and proper notice of the hearing.

4. A veteran has the burden of proving a violation of the Veterans Preference Act.⁵³

5. Mr. Balfanz is an honorably discharged veteran within the meaning of Minn. Stat. §§ 197.447 and 197.455 and is entitled to all of the protections and benefits afforded by the Veterans Preference Act.

6. The City is a political subdivision of the state within the meaning of Minn. Stat. § 197.455, and its personnel practices are therefore subject to the provisions of the Veterans Preference Act.

7. The Veterans Preference Act recognizes that training and experience in the military services of the government and loyalty and sacrifice for the government are qualifications of merit that cannot be readily assessed by examination.⁵⁴

8. The Veterans Preference Act provides “[t]here shall be added to the *competitive open examination rating* of a disabled veteran, who so elects, a credit of 15 points provided that the veteran obtained a passing rating on the examination without the addition of the credit points.”⁵⁵ For the purpose of the preference to be used in securing appointment from a competitive open examination, “disabled veteran” means a person who has a compensable service-connected disability as adjudicated by the United States Veterans Administration, or by the retirement board of one of the several branches of the armed forces, which disability is existing at the time preference is claimed.⁵⁶

9. The Veterans Preference Act also provides that “[t]here shall be added to the *competitive promotional examination rating* of a disabled veteran, who so elects, a credit of five points provided that (1) the veteran obtained a passing rating on the examination without the addition of the credit points; and (2) the veteran is applying for

⁵³ Minn. R. 1400.7300, subp. 5.

⁵⁴ Minn. Stat. § 197.455, subd. 2.

⁵⁵ Minn. Stat. § 197.455, subd. 5 (emphasis added).

⁵⁶ Minn. Stat. § 197.455, subd. 6.

a first promotion after securing public employment.”⁵⁷ For purposes of the preference to be used in securing appointment from a competitive promotional examination, "disabled veteran" means a person who, at the time of election to use a promotional preference, is entitled to disability compensation under laws administered by the Veterans Administration for a permanent service-connected disability rated at 50 percent or more.⁵⁸

10. A “competitive open examination” is an examination where eligibility to compete is extended to all interested persons, both nonemployees and employees of the political subdivision.⁵⁹

11. A “competitive promotional examination” is an examination where eligibility to compete is limited to current employees of the political subdivision, and persons on leave or layoff from a civil service position with the political subdivision.⁶⁰

12. The city of St. Paul administered a competitive open examination, not a competitive promotional examination, for the position of Park and Recreation Program Supervisor because the examination was competitive and eligibility to compete for the examination was extended to all interested persons, not just internal candidates. The posting for the Park and Recreation Program Supervisor specifically provided that the position was “open to anyone who meets the position requirements.”⁶¹

13. An eligible candidate with a rating augmented by veteran’s preference shall be entered on an eligible list ahead of a nonveteran with the same rating.⁶²

14. A governmental agency, when notifying eligible applicants that they have passed examinations, shall show the final examination ratings and preference credits and shall notify eligible applicants that they may elect to use veteran’s preference to augment passing ratings.⁶³

15. The Petitioner is a “disabled veteran” within the meaning of Minn. Stat. § 197.455 for purposes of the preference used in securing appointment from a “competitive open examination” because he is an honorably discharged veteran with a compensable service-connected disability as adjudicated by the United States Department of Veterans Affairs.

16. The City of St. Paul violated the Petitioner’s rights under Minn. Stat. § 197.455, subd. 5, when it failed to add 15 points to the Petitioner’s competitive open examination score for the position of Park and Recreation Program Supervisor during the hiring process for the position.

⁵⁷ Minn. Stat. § 197.455, subd. 5 (emphasis added).

⁵⁸ Minn. Stat. § 197.455, subd. 6.

⁵⁹ See Memorandum at 13-15 (discussing legislative history of the term).

⁶⁰ *Id.*

⁶¹ Ex. B at B-2.

⁶² *Id.*, subd. 8.

⁶³ *Id.*, subd. 9.

17. The Petitioner is entitled to relief pursuant to Minn. Stat. §§ 197.455 and 197.481.

18. The remedy available under the Veterans Preference Act is to require the City to: vacate the hiring decisions for the three openings for the position of Park and Recreation Program Supervisor; allow any external candidates who passed the first part of the examination to take the second part of the examination; award veterans preference points to the Petitioner and any other veterans with a passing examination score who so elect as provided in Minn. Stat. § 197.455; create a list of candidates in ranked order; and interview candidates based on ranked order.

19. The attached Memorandum is incorporated into these Conclusions of Law.

Based upon these Conclusions of Law, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

It is respectfully recommended that the Commissioner of Veteran's Affairs issue an Order determining that:

1. The City of St. Paul filled the three openings for the position of Park and Recreation Program Supervisor in violation of the Veterans Preference Act when it failed to add 15 points to the Petitioner's passing examination score based on his status as a disabled veteran.
2. The City of St. Paul shall: (A) vacate the hiring decisions for the three openings; (B) allow any of the external candidates who passed the first part of the examination to take the second part of the examination if they are still interested; (C) add 15 points to the Petitioner's competitive open examination score and the appropriate number of points to the passing score of any other veteran who so elects⁶⁴; (D) create a list of all candidates, internal and external, in ranked order; and (E) interview candidates based on ranked order.

Dated: May 23, 2014

s/Jeanne M. Cochran

JEANNE M. COCHRAN
Administrative Law Judge

Reported: Digitally Recorded; No transcript prepared

⁶⁴ Pursuant to Minn. Stat. § 197.455, subds. 4-5, a nondisabled veteran with a passing score on a competitive open examination is entitled to have ten (10) points added to his/her score, and a disabled veteran with a passing score is entitled to have fifteen (15) points added to his/her score.

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Veterans Affairs will make the final decision after a review of the record. Under Minn. Stat. § 14.61, the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten calendar days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact Larry W Shellito, Commissioner of Veterans Affairs, 20 W 12th Street, Second Floor, St. Paul, MN 55155, 651-296-2562 to learn the procedure for filing exceptions or presenting argument.

The record closes upon the filing of exceptions to the Report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and Administrative Law Judge of the date the record closes. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a.

Under Minn. Stat. § 14.62, subd. 1, the Commissioner is required to serve the final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

The Veterans Preference Act

The law is well settled in Minnesota that political subdivisions, including the city of St. Paul, must afford a hiring preference to veterans as specified in the Veterans Preference Act.⁶⁵ Pursuant to the Veterans Preference Act, political subdivisions are required to add points to a veteran's job examination score in certain circumstances.⁶⁶ The Veterans Preference Act provides in relevant part:

Subd. 4. Nondisabled veteran's credit.

There shall be *added to the competitive open examination rating* of a nondisabled veteran, who so elects, *a credit of ten points* provided that the veteran obtained a passing rating on the examination without the addition of the credit points.

Subd. 5 Disabled veteran's credit.

There shall be added to the competitive open examination rating of a disabled veteran, who so elects, a credit of 15 points provided that the veteran obtained a passing rating on the examination without the addition of the credit points. There shall be *added to the competitive promotional*

⁶⁵ Minn. Stat. § 197.455.

⁶⁶ *Id.*, subds. 4-6.

examination rating of a disabled veteran, who so elects, a credit of five points provided that (1) the veteran obtained a passing rating on the examination without the addition of the credit points; and (2) the veteran is applying for a first promotion after securing public employment.

Subd. 6. Disabled veteran; definitions.

For the purpose of the preference to be used in securing appointment from a competitive open examination, "disabled veteran" means a person who has a compensable service-connected disability as adjudicated by the United States Veterans Administration, or by the retirement board of one of the several branches of the armed forces, which disability is existing at the time preference is claimed. For purposes of the preference to be used in securing appointment from a competitive promotional examination, "disabled veteran" means a person who, at the time of election to use a promotional preference, is entitled to disability compensation under laws administered by the Veterans Administration for a permanent service-connected disability rated at 50 percent or more.

While the term "disabled veteran" is defined, the terms "competitive open examination" and "competitive promotional examination" are not defined in statute.⁶⁷

As specified in subdivisions 4 through 6 of Minn. Stat. § 197.455, the determination of whether points are to be added to a veteran's job examination score depends on the type of examination that is administered (open or promotional) and whether the veteran is disabled or nondisabled.⁶⁸ For a competitive open examination, all veterans with a passing score are entitled to additional points, but the number of points varies between nondisabled and disabled veterans.⁶⁹ Nondisabled veterans are entitled to ten (10) additional points and disabled veterans are entitled to fifteen (15) additional points.⁷⁰ For a competitive promotional examination, only disabled veterans with a passing score are entitled to additional points and, then, only if the veteran is applying for a first promotion after securing public employment.⁷¹

Position of the Parties

The parties to this case disagree as to whether the City was required by the Veterans Preference Act to add points to the Petitioner's score as part of the hiring process for the position of Park and Recreation Program Supervisor with the City.

⁶⁷ Minn. Stat. § 197.455.

⁶⁸ As specified in Minn. Stat. § 197.455, subd. 6, the term "disabled veteran" has two different definitions: one for purposes of a "competitive open examination" and one for purposes of a "competitive closed examination."

⁶⁹ *Id.*, subds. 4-5.

⁷⁰ *Id.*

⁷¹ *Id.*, subd. 5.

The Petitioner argues that the City administered a competitive open examination and, as a disabled veteran, the Petitioner was entitled to have fifteen (15) points added to his passing score of 75.7 pursuant to Minn. Stat. § 197.455, subd. 5.⁷² In support of his position, the Petitioner notes that the City's posting for the position stated that the position was "open to anyone who meets the position requirements."⁷³ The Petitioner argues that if the City had wanted to limit the position to internal candidates only it should have posted the position as Internal rather than Open. Because the City posted the position as Open, the Petitioner maintains that the City violated his rights under the Veterans Preference Act when it failed to add 15 additional points to his passing score. The Petitioner argues that the City Human Resources Department improperly considered him to be a promotional candidate and ineligible for veterans preference points.⁷⁴ To remedy this alleged violation, the Petitioner asserts that he should have 15 points added to his examination score. This would make him the highest ranked candidate with a score of 90.7. Based on this revised score, the Petitioner maintains that he should be allowed to interview for the position, and if he is denied the position, the city of St. Paul must provide him with a valid written reason why he should not be granted the position.⁷⁵

The City, on the other hand, argues that it has fully complied with the Veterans Preference Act and that it properly denied the Petitioner's request to have 15 points added to his score based on his status as a veteran. The City argues that the examination was a promotional examination, not an open examination, because only the internal candidates completed the test. The City maintains that it canceled the open examination, when it decided to give the second part of the examination to only internal candidates.⁷⁶ The City argues that because the examination was promotional, the Petitioner is not entitled to any additional points based on his veterans' status because to obtain additional points for a promotional examination, the veteran must be at least 50 percent disabled and applying for his first promotion. The City notes that the Petitioner does not meet either of these criteria.⁷⁷

The City also argues that, even if the examination was an open examination, the City complied with the Veterans Preference Act. The City interprets the Act as allowing the City to give an absolute preference to promotional candidates even when an open competitive examination is given. The City maintains that because the Petitioner is already employed by the City and has already been promoted, the Petitioner is not entitled to additional points based on his status as a veteran.⁷⁸ The City argues that the Act only gives preference points to disabled veterans when they first apply and upon first application for promotion. The City maintains that veterans preference points do

⁷² Petitioner's Post-Hearing Brief at 5-6 (April 18, 2014).

⁷³ *Id.* (citing Ex. B).

⁷⁴ *Id.*

⁷⁵ *Id.* at 8 (citing Minn. Stat. § 197.445, subd. 10).

⁷⁶ City of St. Paul Closing Argument at 4-5 (May 1, 2014).

⁷⁷ See Minn. Stat. § 197.455, subds. 5-6. The Petitioner does not dispute that if the examination is determined to be promotional, he is not entitled to any additional points. Test. of B. Balfanz.

⁷⁸ City of St. Paul Closing Argument at 6-9.

not apply throughout a public career.⁷⁹ Finally, the City argues that if the Commissioner disagrees with the City's view and finds that the City erred when it denied the Petitioner his preference points, then the Petitioner is not entitled to the relief that he requests. According to the City, if a violation is found, the appropriate relief is for the City to: (1) complete the examination process for the non-promotional candidates who passed the first part of the examination; (2) add 15 points to the Petitioner's competitive examination rank; (3) create a "open" list with all candidates, internal and external, in ranked order; and (4) interview candidates based on the criteria in Civil Service Rules.⁸⁰

Analysis

The question of whether the City violated the Veterans Preference Act when it denied the Petitioner's request to have points added to his examination score for the position of Park and Recreation Program Supervisor based on his status as a veteran turns on two main issues. Those issues are: (1) whether the examination given by the City for the position was a "competitive open examination" or a "competitive promotional examination" within the meaning of Minn. Stat. § 197.455; and (2) if the examination was a "competitive open examination," whether the Petitioner was entitled to have 15 points added to his score as a disabled veteran. These issues are addressed in turn below.

1. Whether the Examination was Open or Promotional?

As noted above, the Veterans Preference Act awards points to veterans differently depending on whether the City gives a "competitive *open examination*" or a "competitive *promotional examination*" as part of the hiring process.⁸¹ The Veterans Preference Act does not define the terms "competitive open examination" or "competitive promotional examination."⁸² The legislative history of the Act, however, provides guidance as to the meaning of those terms as used in the Act.

a. Legislative History

The Act dates back to 1887, at the close of the Civil War, giving preference in employment and appointment to honorably discharged Union soldiers and sailors.⁸³ Since that time, veterans preference rights have been modified and altered.

In 1907, it was the policy of the state to grant an absolute preference in hiring to soldiers, sailors and marines of the Civil War. The preference applied to all governmental units in the state, including cities.⁸⁴

⁷⁹ *Id.* at 6-8.

⁸⁰ *Id.* at 9-10.

⁸¹ Minn. Stat. § 197.455, subds. 4-6.

⁸² *Id.*

⁸³ In *State ex. Rel. Cowden v. Miller*, 66 Minn. 90, 68 N.W. 732 (1896), Justice William Mitchell wrote the opinion upholding the constitutionality of Laws of Minn. 1887, Chapter 149, which was entitled "An Act giving preference in appointment and employment to honorably discharged Union soldiers and sailors."

⁸⁴ Revised Laws of Minn., Supp. 1907, ch. 24, § 1849-1.

The law was changed in 1939 when the legislature adopted a modified preference for the state civil service. Under the modified veterans preference law, veterans applying for state employment received preference points added to their examination rating.⁸⁵ The Legislature, however, only changed the law with regard to state civil service. "Until 1975, governmental subdivisions remained obliged to grant absolute hiring preference to veterans who were capable of performing the duties required and were of good character."⁸⁶

In 1975, the legislature made the modified point-based preference applicable to political subdivisions, as well as the state civil service system, when it amended Minn. Stat. § 43.30, repealed Minn. Stat. § 197.45 and adopted Minn. Stat. § 197.455.⁸⁷ Minn. Stat. § 43.30 was amended, in relevant part, to read as follows:

43.30 VETERANS PREFERENCE.

. . .

Recognizing that training and experience in the services of the government and loyalty and sacrifice for the government are qualifications of merit which cannot be readily discovered by examination; there shall be added to the examination rating of a disabled veteran, if he so elects, a credit of ten points if the veteran obtained a passing grade without the addition of the credit points; and if the disabled veteran is able to perform the duties of the position sought with reasonable efficiency, his name shall be placed on the list of eligible with the names of other eligible persons. The name of a veteran with such augmented rating shall be entered ahead of a nonveteran when their ratings are the same.

There shall be added to the examination rating of a nondisabled veteran, if he so elects, a credit of five points if the veteran obtained a passing grade without the additions of the credit points. The name of a veteran with such augmented rating shall be entered ahead on a non-veteran when their ratings are the same.

A governmental agency, when notifying an applicant that he has passed an examination, shall notify the veteran of his specific score and shall also notify the applicant that he may elect to use a veteran's preference to augment his passing rating.

A veteran's preference under this section may only be used in the state civil service and political subdivisions of the state in the securing of positions to be filled by open competitive examinations and may not be used for the filling of promotional positions. **An open competitive**

⁸⁵ See *Hall v. City of Champlin*, 463 N.W. 2d 502, 504 (Minn. 1990).

⁸⁶ *Id.* (citing Minn. Stat. § 197.45, subd. 2 (1974)).

⁸⁷ 1975 Minn. Laws ch. 45 (1974).

examination is an examination open to current employees and nonemployees of the state or political subdivision. A veteran's preference under this section may not be used by any veteran who is eligible to receive a monthly veteran's pension benefit based exclusively on length of military service.

Notwithstanding the foregoing restrictions on use, **in any governmental agency giving an examination, where an applicant for a promotional position is a disabled veteran who has passed the promotional examination for his first promotion after entering that position, he may elect to have a credit of five points added to that examination rating.** The decision to make such election may be made either before or after the examination. **This promotional preference may only be successfully used one time and only in the securing of the first promotional position after securing public employment. . . .** (Emphasis added)⁸⁸

In addition, new Minn. Stat. § 197.455 provided, in relevant part, that “the provisions of Minn. Stat. § 43.30 granting preference to veterans in the state civil service shall also govern preference of a veteran under the civil service laws, charter provisions, ordinances, rules or regulations of a county, city, town, school district, or other municipality or political subdivision of the state”⁸⁹

In 1981, Chapter 43 of Minnesota Statutes was repealed and replaced with Chapter 43A. Minn. Stat. § 43.30 was replaced with Minn. Stat §§ 43A.02, subds. 15 and 16; and 43A.10 and 11.⁹⁰ These 1981 statutory changes included adding specific definitions for competitive open and competitive promotional examinations.⁹¹ The law defined a competitive open examination as:

‘Competitive open’ means eligibility to compete in an examination for state employment is extended to all interested persons.⁹²

A competitive promotional examination was defined as:

‘Competitive promotional’ means eligibility to compete in an examination for state employment is limited to persons currently occupying, or on leave or layoff from, civil service positions.⁹³

In addition, Minn. Stat. § 43A.11 included language providing for the award of additional points to the “competitive open examination” score and to the “competitive promotional

⁸⁸ 1975 Minn. Laws, ch. 45, § 2.

⁸⁹ 1975 Minn. Laws, ch. 45, § 4.

⁹⁰ 1981 Laws of Minn., ch. 210, §§ 2, 10, 11.

⁹¹ 1981 Minn. Laws, ch. 210, § 2 (codified at Minn. Stat. § 43A.03, subds. 15 and 16).

⁹² *Id.*

⁹³ *Id.*

examination” score of veterans who meet specified criteria.⁹⁴ The legislature also amended Minn. Stat. § 197.455 to incorporate a reference to Minn. Stat. § 43A.11 in place of Minn. Stat. § 43.30.

In 2004, the legislature overhauled both Chapter 43A and Section 197.455. Among other changes, the legislature moved the language regarding award of preference points into Minn. Stat. § 197.455. In doing so, references to Minn. Stat. ch. 43A in section 197.455 were deleted, and the definitional language for “competitive open” and “competitive promotional” formerly contained in Minn. Stat. § 43A.02, subds. 15 and 16 was removed. In addition, the terms “competitive open examination” and “competitive promotional examination” were transferred to Minn. Stat. § 197.455 in new subdivisions 4 and 5 but not the definitions.⁹⁵ The legislature also changed the title of Minn. Stat. § 197.455 from “State Law Applicable” to “Veteran’s Preference Applied,” together with additional changes separating Minn. Stat. ch. 43A from section 197.455.⁹⁶ As noted by House Research in the Act Summary:

[Veteran’s Preference Applied section] writes into the local government law the substance of what had been in the state law....⁹⁷

While the specific definitions of “competitive open” and “competitive promotional,” formerly contained in Minn. Stat. § 43A.02, subds. 15 and 16, were not inserted into Minn. Stat. § 197.455, there is no indication that the legislature intended to give these terms a new meaning. To the contrary, if the legislature had intended to change their meaning, it would have specifically added new definitions. It would not have left the terms undefined.

b. Application of the Definitions to Facts

Based on this legislative history of the Veterans Preference Act, the Administrative Law Judge concludes that the terms “competitive open examination” and “competitive promotional examination” in the current version of the Act have the same meaning as that given to them in the prior version of the Act. Namely, a “competitive open examination” is an examination where eligibility to compete in the examination is extended to all interested persons.⁹⁸ A “competitive promotional examination” is an examination where eligibility is limited to persons currently occupying, or on leave or layoff from, civil service positions.⁹⁹

Applying these definitions to the facts in this case, the Administrative Law Judge concludes that the City conducted a “competitive open examination,” not a “competitive promotional examination,” for the position of Park and Recreation Program Supervisor.

⁹⁴ *Id.* at § 11.

⁹⁵ 2004 Minn. Laws, ch. 207, §§ 9, 10, 12, 13, 29, and 31.

⁹⁶ *Id.*, at § 29.

⁹⁷ House Research Act Summary for Chapter 207 (May 20, 2004) (available at <http://www.house.leg.state.mn.us/hrd/as/83/as207.pdf>).

⁹⁸ See 1981 Minn. Laws, ch. 210, § 2 (subd. 15).

⁹⁹ *Id.* (subd. 16)

In its posting, the City specifically stated that the position is “open to anyone who meets the position requirements.”¹⁰⁰ In addition, the City gave the Training and Experience Examination, the first part of the overall examination, to both external and internal applicants for the position.¹⁰¹ The City also scored the Training and Experience Examination for both external and internal applicants who met the City’s minimum requirements.¹⁰² Because the City extended eligibility to compete in the examination to both external and internal applicants, the examination was a competitive open examination.¹⁰³

The fact that the City did not allow the external applicants who passed the first part of the examination to take the second part of the examination does not convert the examination into a “competitive promotional examination,” as the City maintains. By denying external applicants the opportunity to take the second part of the examination, the City in effect gave those external candidates the score of zero on that part of the examination. The City cannot claim that the examination was a “competitive promotional examination” because eligibility for the examination was not limited solely to internal candidates and persons on leave or layoff from civil service.¹⁰⁴ The examination was open to anyone who met the position requirements.¹⁰⁵

Moreover, the City cites no authority to support its view that it can convert a “competitive open examination” into a “competitive promotional examination” part way through the examination process. If the City wanted to offer the examination to promotional candidates only, it could have done so by posting the position as Internal only.¹⁰⁶ The City, however, chose not to do so. For these reasons, the Administrative Law Judge concludes that the City’s examination for the Park and Recreation Program Supervisor position was a “competitive open examination” within the meaning of Minn. Stat. § 197.455.

2. Whether the Petitioner was entitled to have 15 points added to his competitive open examination rating?

Having found that the City administered a “competitive open examination,” the next question is whether the City should have added points to the Petitioner’s passing examination score based on his status as a veteran. The Veterans Preference Act provides that when a political subdivision such as a city administers a competitive open examination, “[t]here shall be added to the competitive open examination rating of a disabled veteran, who so elects, a credit of 15 points provided that the veteran obtained a passing rating on the examination without the addition of the credit points.”¹⁰⁷ For the

¹⁰⁰ Ex. B.

¹⁰¹ Test. of L. McKeown.

¹⁰² *Id.*

¹⁰³ See 1981 Minn. Laws ch. 210, § 2 (subd. 15).

¹⁰⁴ See *id.*, § 2 (subd. 16).

¹⁰⁵ Ex. B.

¹⁰⁶ Test. of L. McKeown; Ex. 9.

¹⁰⁷ Minn. Stat. § 197.455, subd. 5 (emphasis added).

purpose of the preference to be used in securing appointment from a competitive open examination, "disabled veteran" means "a person who has a compensable service-connected disability as adjudicated by the United States Veterans Administration, or by the retirement board of one of the several branches of the armed forces, which disability is existing at the time preference is claimed."¹⁰⁸

Here, it is undisputed that the Petitioner received a passing score of 75.7 on the examination without the addition of the veterans preference points.¹⁰⁹ It is also undisputed that the Petitioner is an honorably discharged veteran, who has a compensable service-connected disability as determined by the USDVA.¹¹⁰ Based on these facts, the Administrative Law Judge concludes that the Petitioner qualifies as a "disabled veteran" for the purposes of determining whether he is entitled to have 15 additional points added to his competitive open examination rating.¹¹¹ In addition, the Administrative Law Judge concludes that the City violated the Veterans Preference Act when it failed to add 15 points to the Petitioner's passing score after the Petitioner specifically requested that the City provide him with the points based on his status as a disabled veteran under the Veterans Preference Act.¹¹²

The City's arguments to the contrary are not persuasive. First, the City maintains that the Veterans Preference Act only provides veterans preference points at the time of initial hire, and, in some cases, at the time of first promotion.¹¹³ Because Mr. Balfanz already has a job with the City and has already been promoted, the City argues that Mr. Balfanz is not entitled to any additional points even if the examination for the position was a "competitive open examination."¹¹⁴

This argument is inconsistent with the plain language of the statute. Nothing in the plain language of Minn. Stat. § 197.455 limits the award of veterans preference points in conjunction with an "open competitive examination" only to outside candidates and current employees who have not yet been promoted. To the contrary, subdivision 5 of the Act provides:

There shall be added to the competitive open examination rating of a disabled veteran, who so elects, a credit of 15 points provided that the

¹⁰⁸ Minn. Stat. § 197.455, subd. 6.

¹⁰⁹ Ex. 6; Test. of B. Balfanz.

¹¹⁰ Test. of B. Balfanz; Ex. C.

¹¹¹ In the Administrative Law Judge's Order Denying City of St. Paul's Motion for Summary Disposition, the Administrative Law Judge mistakenly stated that if the examination was an open examination, the Petitioner would have been entitled to 10 additional points. The Order should have stated that the Petitioner would have been entitled to 15 additional points. See Order Denying City of St. Paul's Motion for Summary Disposition at 7 (February 25, 2014); Minn. Stat. § 197.455.

¹¹² Minn. Stat. § 197.455, subds. 5-6; Test. of B. Balfanz; Ex. C.

¹¹³ City of St. Paul Closing Argument at 7-8.

¹¹⁴ *Id.* at 8-9. In addition, the City also points out that the Petitioner is not more than 50 percent disabled, which is an additional criteria for promotional points.

veteran obtained a passing rating on the examination without the addition of the credit points.”¹¹⁵

This language, by its terms, applies to all “disabled veterans” who have obtained a passing rating. Likewise, there is no language in the definition of “disabled veteran” including any such limitations. The definition provides that for the purposes of competitive open examination points, “disabled veteran” means “a person who has a compensable service-connected disability as adjudicated by the United States Veterans Administration, or by the retirement board of one of the several branches of the armed forces, which disability is existing at the time preference is claimed.”¹¹⁶ There is simply no support for the City’s limited reading in the plain language of the Veterans Preference Act. Nor is there any case law cited by the City that supports its position.¹¹⁷

The City also argues that the Petitioner’s (and Administrative Law Judge’s) interpretation of the Veterans Preference Act should be rejected because it would require the City to place all candidates on one “open” list and “deny promotional rights to current employees guaranteed by the City’s Civil Service Rules and collective bargaining agreements.”¹¹⁸ The City maintains that the promotional preference in its Civil Service Rules is protected by the Minnesota Public Employees Labor Relations Act.¹¹⁹

As the City is aware, however, the Veterans Preference Act specifically provides that “[a]ny provision in a law, charter, ordinance, rule or regulation contrary to the applicable provisions of [Minn. Stat. § 197.455] is void to the extent of such inconsistency.”¹²⁰ Thus, to the extent that “promotional rights” in the City’s Civil Service Rules are inconsistent with the Veterans Preference Act, they must yield to the rights provided in the Act. The City cites no authority to the contrary.¹²¹ Moreover, in the view of the Administrative Law Judge, the City can generally maintain the promotional rights in its Civil Service Rules simply by posting all classified job openings as Internal first. If the City does not have enough internal candidates to fill an open position through the internal process, then the City can post the position as Open to the public. This would

¹¹⁵ Minn. Stat. § 197.455, subd. 5 (emphasis added).

¹¹⁶ Minn. Stat. § 197.455, subd. 6.

¹¹⁷ The City cites *State ex rel. Dolan v. Civil Service Bureau of City of St. Paul*, 293 Minn. 477, 480, 197 N.W.2d 711 (1972) in its brief. This case, however, deals with a competitive *promotional* examination, not a competitive *open* examination. *State ex rel. Dolan* does not address the issue here: namely, whether an existing city employee who is a disabled veteran is entitled to have points added to a passing score on a competitive open examination. *Id.*

¹¹⁸ *Id.* at 6.

¹¹⁹ *Id.* at 7-8.

¹²⁰ Minn. Stat. § 197.455, subd. 1(a).

¹²¹ While the City cites two cases to argue that promotional rights provided by its Civil Service Rules are protected by the Public Employee Labor Relations Act, these cases do not address the language in Minn. Stat. § 197.455, subd. 1, providing that the Veterans Preference Act take precedence over any other state or local law to the extent of any inconsistency. See City of St. Paul Closing Argument at 6 (citing *University Educ. Ass’n v. Regents of University of Minnesota*, 353 N.W.2d 534 (Minn. 1984) and *International Union of Operating Engineers, Local No. 49 v. City of Minneapolis*, 305 Minn. 364, 233 N.W.2d 748 (1975)).

allow the City to first hire promotional candidates and then hire external candidates, as currently contemplated by its Civil Service Rules.¹²²

In conclusion, after a careful review of the facts in this case and the plain language of Minn. Stat. § 197.455, subds. 5-6, the Administrative Law Judge concludes that the City violated the Veterans Preference Act when it failed to add 15 points to the Petitioner's competitive open examination rating for the position of Park and Recreation Supervisor.

3. What Relief is the Petitioner Entitled to Based on the City's Violation of the Veterans Preference Act?

The parties disagree as to the relief that should be granted if a violation is found based on the City's failure to award the Petitioner the additional 15 points to his competitive open examination score. The Petitioner asserts that the hiring decisions for the Park and Recreation Program Supervisor position should be vacated, the City should be required to add 15 points to his score, and he should be allowed to interview for the position because, with the additional 15 points, he would be the highest ranked applicant. If he is denied the position after this new hiring process, the Petitioner asserts that the city of St. Paul must provide him with a valid written reason why he should not be granted the position.¹²³ The City, on the other hand, contends that the appropriate relief is for the City to: (1) complete the examination process for the non-promotional candidates who passed the first part of the examination; (2) add 15 points to the Petitioner's competitive examination rating; (3) create a list with all candidates, internal and external, in ranked order; and (4) interview candidates based on the criteria in Civil Service Rules.

The Administrative Law Judge agrees for the most part with the City's position. The Administrative Law Judge concludes the relief provided should be designed to put the Petitioner in the position he would have been in if the City had followed the Veterans Preference Act during the original hiring process for the three openings for Park and Recreation Program Supervisor. If the City had followed the process contemplated by the Veterans Preference Act, it would have added an additional 15 points to the Petitioner's passing examination score. It would have also added points to the passing score of any other "veteran" who so elected, whether an external and internal candidate.¹²⁴ To comply with the Act, it is necessary for the City to: (1) vacate the hiring decisions for the three openings; (2) allow any external candidates who passed the first part of the examination to take the second part of the examination if they are still interested; (3) add 15 points to the Petitioner's competitive open examination rating and the appropriate number of points to the passing competitive examination rating of any other veteran who so elects; (4) create a list with all candidates, internal and external, in ranked order; and (5) interview candidates based on ranked order.

¹²² Ex. G (Civil Service Rule 8.A.1).

¹²³ *Id.* at 8 (citing Minn. Stat. § 197.445, subd. 10).

¹²⁴ See Minn. Stat. § 197.455, subds. 4-5.

This relief will afford the Petitioner the points and increased opportunity to interview that he is entitled to under the Veterans Preference Act.¹²⁵ The relief proposed, however, does not require that the City hire the Petitioner for one of the three openings because the Veterans Preference Act does not provide an absolute preference for hiring of veterans.¹²⁶ The appointing authority may hire any qualified applicant, after complying with the requirements of the Veterans Preference Act.¹²⁷

J. M. C.

¹²⁵ Minn. Stat. § 197.455, subd. 5.

¹²⁶ *Id.*

¹²⁷ *McAfee v. Dept. of Revenue*, 514 N.W.2d 301, 305 (Minn. Ct. App. 1994).